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No. 88-235

# In the Supreme Court of the United States

OCTOBER TERM, 1988

BARRY M. WOLFE, PETITIONER

*v.*

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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**MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION**

Petitioner, who is seeking to upgrade his discharge from the Army, contends that the United States Court of Appeals for the Federal Circuit rather than the United States Court of Appeals for the District of Columbia Circuit had appellate jurisdiction in this case.

1. After an investigation of the sale of illegal drugs at Fort Belvoir, Virginia, the Army filed court-martial charges against petitioner (Pet. App. 3A). Petitioner then requested a "chapter 10 discharge," under which a member of the military admits that he is guilty of charges that authorize a bad conduct or dishonorable discharge, states that he does not wish to remain in the military, and acknowledges that his discharge, if accepted, can be under other than honorable conditions (*id.* at 4A-5A). The officer exercising general court-martial jurisdiction approved the discharge request, and petitioner was discharged under than less honorable conditions (*id.* at 6A).

Petitioner subsequently asked the Army Discharge Review Board to upgrade his discharge to honorable. The Review Board denied his request for an upgrade, as did the Army Board for the Correction of Military Records (Pet. App. 6A-7A), and the district court granted summary judgment to the Army on petitioner's request for judicial review of the Correction Board's decision (*id.* at 43A-73A).

Petitioner appealed to the D.C. Circuit. In its initial decision (Pet. App. 1A-26A), the court of appeals rejected his assertions of procedural irregularities in the initial discharge decision.[1] Petitioner then filed a motion for reconsideration, arguing that the D.C. Circuit lacked appellate jurisdiction. Asserting that the district court's jurisdiction was based in part on the "Little Tucker Act," 28 U.S.C. 1346(a)(2), petitioner argued for the first time that exclusive jurisdiction to review that decision on appeal lay in the United States Court of Appeals for the Federal Circuit under 28 U.S.C. 1295(a)(2). He asked the court to withdraw its opinion and transfer the case to the Federal Circuit. See Pet. App. 28A-29A.

The court of appeals, however, in a lengthy supplemental opinion, denied the motion to transfer (Pet. App. 27A-42A). It based its decision on its earlier ruling in

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[1] Petitioner's main argument on appeal was that the officer who originally decided that his discharge would be less than honorable violated Army regulations by not first obtaining the recommendations of petitioner's intermediate commanders. The court reasoned that the Correction Board did not act in an arbitrary and capricious manner in rejecting that argument, since the deciding officer's failure to obtain recommendations from the lower officers did not affect his legal authority as a decisionmaker, only the sufficiency of the data that he used in his decision (Pet. App. 21A-24A). The court determined that petitioner's other arguments were "plainly without merit" (*id.* at 9A n.3).

*Vietnam Veterans of America* v. *Secretary of the Navy*, 843 F.2d 528, 533-535 (1988), which it characterized as holding that "where a plaintiff seeking an upgrade neither *seeks* nor is *granted* monetary relief, the mere fact that a government payment of money is an automatic concomitant of the requested relief does not support Little Tucker Act jurisdiction" (Pet. App. 29A (emphasis in original)). The court examined the district court record and concluded that at no time did petitioner make an express request for money damages (*id.* at 29A-33A). The court reasoned that a "bright line rule" (*id.* at 38A) against such implied claims for money damages is necessary because "[t]here is no reason why trial courts (or appellate courts) should have to resort to close scrutiny of ambiguous memoranda to glean an intent to set forth a monetary claim" (*id.* at 39A).

2. While we do not necessarily agree with the D.C. Circuit's determination that it had jurisdiction over the appeal in this case, the technical issue petitioner raises is neither sufficiently important nor the subject of sufficient disagreement among the circuits to warrant a grant of certiorari. Moreover, despite our doubts about the D.C. Circuit's jurisdictional holding, that holding is not so clearly wrong that a summary disposition of the petition would be in order. For those reasons, and because petitioner would not, on the facts of this case, be entitled to benefit even if this Court were to agree with his jurisdictional contention, the petition should be denied.

a. In cases involving the correction of military records, plaintiffs occasionally file suit in district court asking for equitable relief (*e.g.*, reinstatement or a discharge upgrade) but leaving ambiguous the question whether they also seek monetary relief. See, *e.g.*, *Vietnam Veterans of America* v. *Secretary of the Navy*, *supra*; *ben-Shalom* v. *Secretary of the Army*, 807 F.2d 982 (Fed. Cir.

1986). Such ambiguities give rise to difficulties in determining jurisdiction, both at the trial level (where the United States Claims Court rather than a district court has always been thought to have exclusive jurisdiction under 28 U.S.C. 1491 over backpay claims for more than $10,000) and at the appellate level (where the Federal Circuit rather than the regional circuit has exclusive jurisdiction under 28 U.S.C. 1295(a)(2) if the plaintiff's monetary claim was cognizable in district court under the Little Tucker Act).

The federal government, in defending such suits, has heretofore sought to resolve such ambiguities by assuming that a plaintiff, unless he or she expressly waives monetary recovery, is seeking monetary relief whenever such relief would follow naturally from the equitable relief the plaintiff seeks. Thus, in the *Vietnam Veterans* case, we urged the court to hold that the complaint should be read as asserting a monetary claim and that the Federal Circuit had exclusive jurisdiction over the appeal. And, in this case, we filed a memorandum agreeing with petitioner that the Federal Circuit had exclusive jurisdiction over the appeal (see Pet. App. 29A n.1). In both cases, however, the court rejected our argument, and in fact there is no published decision of a court of appeals that accepts that argument in the context of a military correction board case. But cf. *Matthews* v. *United States*, 810 F.2d 109, 113 (6th Cir. 1987). In the absence of a square conflict in the circuits, we have not thought this issue sufficiently important—or the case law sufficiently developed—to ask this Court to address the issue. Nor do we agree with petitioner that the issue is ripe for this Court's consideration in this case.

The approach that the D.C. Circuit has taken to this issue, and applied in this case, is at the opposite extreme from the position we have advocated, but it serves the same objective of resolving ambiguities through predict-

able rules. When it is unclear whether the plaintiff seeks monetary relief, the D.C. Circuit presumes that he or she does not seek such relief unless an unambiguous request has been made. See *Vietnam Veterans*, 843 F.2d at 533-535; Pet. App. 29A. In this case, the court of appeals determined that petitioner had not unambiguously sought monetary relief, and it therefore treated the case as one in which the plaintiff sought equitable relief only (see *id.* at 29A-40A).[2] Although the D.C. Circuit's approach is not the one we have advocated in the past, it does make some sense from the standpoint of judicial economy, and we cannot say that it is so clearly wrong that summary action by this Court would be warranted.[3]

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[2] Petitioner nowhere discusses the theory on which the D.C. Circuit held that it had jurisdiction, so it is difficult to determine the basis of his challenge to that theory. Indeed, petitioner describes this case—quite incorrectly—as one involving an inadvertent "failure of • • • the Court of Appeals • • • to take notice of the jurisdictional issue" (Pet. 13), rather than an extensively reasoned resolution of the jurisdictional issue (Pet. App. 27A-42A). If petitioner means to quarrel with the D.C. Circuit's determination that any request he may have made for monetary relief was ambiguous, then he has raised a fact-bound issue concerning the reading of a particular record that is plainly not of the sort that deserves this Court's review.

[3] By contrast, in *Ballam* v. *United States*, 474 U.S. 1078 (1986), on which petitioner relies (Pet. 13-14), the opinion of the court of appeals stated in its opening paragraph that the district court had jurisdiction under the Little Tucker Act. *Ballam* v. *United States*, 747 F.2d 915, 917 (4th Cir. 1984). There was thus no room for debate in *Ballam* about whether the Federal Circuit had exclusive appellate jurisdiction under 28 U.S.C. 1295(a)(2).

b. Even if the jurisdictional issue that petitioner raises were sufficiently important, controversial, or clear to warrant this Court's attention, and even if this Court were to determine that the Federal Circuit rather than the D.C. Circuit had jurisdiction, it would not follow that petitioner would be entitled to the relief he seeks, namely a transfer to the Federal Circuit. The normal remedy when a court of appeals lacks jurisdiction is dismissal of the appeal—a remedy that obviously would do petitioner no good, since he lost in the district court. An exception to that normal remedy is codified in 28 U.S.C. 1631, which allows transfer to a different court "if it is in the interest of justice." A transfer in this case would not be in the interest of justice.

It was petitioner himself who noticed an appeal to the D.C. Circuit rather than the Federal Circuit. More than a year passed between filing of the notice of appeal and judgment, yet at no time did petitioner call the alleged jurisdictional defect to the attention of the court of appeals. It was not until 13 days after the court rendered its judgment, which was adverse to petitioner, that petitioner raised the jurisdictional issue for the first time. See Pet. 11. Moreover, for the reasons given by the court of appeals (Pet. App. 9A n.3, 11A-25A), petitioner's substantive claims are plainly without merit. Therefore it would accomplish nothing but a waste of judicial resources to force yet another court of appeals to pass on this case. Given the combination of petitioner's dilatoriness and the lack of merit to his substantive claims, it certainly would not be "in the interest of justice" to transfer the case to the Federal Circuit. Rather, if petitioner were to prevail on the

jurisdictional issue, the proper course would be to dismiss petitioner's appeal to the D.C. Circuit and leave the judgment of the district court intact.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

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